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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HENDERINA ROLAND, Plaintiff and Respondent, v. NURSING HOME SOLUTIONS, INC., et al., Defendants and Appellants.	B191046 (Los Angeles County Super. Ct. No. EC041831)

APPEAL from an order of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Affirmed.

Timothy B. Sottile; Lasher & Lasher and Wendy Cole Lascher for Defendants and Appellants.

Law Office of John Derrick and John Derrick for Plaintiff and Respondent.

Plaintiff, a 78-year-old widow, signed an agreement with defendant company for assistance in qualifying for the California Medical Assistance Program (Medi-Cal). No one signed the agreement on behalf of the company, which, through the services of an attorney, obtained Medi-Cal benefits for plaintiff.

Plaintiff filed this action against the company and two attorneys associated with it, alleging they had defrauded her out of her home and personal property. Defendants moved to compel arbitration pursuant to an arbitration provision in the agreement, arguing that the lack of a signature did not matter because the company had performed the required services. (See Civ. Code, § 3388.) Plaintiff countered that the agreement was one for legal services, and the lack of a signature rendered the agreement voidable at her option. (See Bus. & Prof. Code, § 6148, subds. (a), (c).) The trial court denied the motion for arbitration.

We conclude that, notwithstanding the agreement's disclaimer that the company "do[es] not provide legal services," the agreement was, in reality, an attorney fee agreement. The services outlined in the agreement were of a legal nature and were in fact performed by an attorney. Because the agreement was not signed by an attorney, plaintiff was allowed to treat it as void. Accordingly, the trial court properly denied arbitration and we affirm.

I

BACKGROUND

The following allegations and facts are taken from the complaint and the evidence submitted on the motion to compel arbitration.

A. Complaint

In November 2005, Henderina Roland filed this action against Nursing Home Solutions, Inc. (NHS), and Bonnie Marshall, among others. Later, she added Zoran Basich as a defendant by way of a Doe amendment. Both Marshall and Basich are attorneys in California.

Roland alleged as follows. NHS provided legal services for the purpose of obtaining Medi-Cal benefits for its clients. NHS charged Roland a fee of approximately $30,000 in exchange for its services. Defendants convinced Roland to transfer her home and personal property to a third person in exchange for no consideration. Defendants falsely told Roland that the transfers were necessary for her to qualify for Medi-Cal benefits.

The complaint asserted three causes of action against defendants: breach of fiduciary obligation; fraud, and financial elder abuse.

B. Motion to Compel Arbitration

In March 2006, defendants filed a motion to compel arbitration. On May 20, 2002, Roland had signed an agreement (Agreement) with NHS's predecessor, N.H.S., LLC. In the first paragraph of the Agreement, NHS stated: "WE ARE A COMPANY THAT HAS OVER 22 YEARS OF EXPERIENCE IN OBTAINING MAXIMUM HEALTH CARE BENEFITS AT MINIMAL COST. OUR FOCUS IS FEDERAL AND STATE HEALTH CARE BENEFITS FOR LONG-TERM NURSING HOME CARE."

The second paragraph began: "**WE ARE NOT A LAW FIRM. WE DO NOT HOLD OURSELVES OUT AS ATTORNEYS. WE DO NOT PROVIDE LEGAL ADVICE OR SERVICES. WE DO NOT SELL INSURANCE. WE ARE NOT THE FEDERAL GOVERNMENT. WE ARE NOT THE MEDI-CAL OFFICE. WE ARE NOT A NURSING HOME. WE ARE NOT ACCOUNTANTS AND WE DO NOT GIVE LEGAL OR TAX ADVICE.**" (Boldface and underscoring in original.)

The Agreement stated that if a "client" needed the services of accountants, automobile purchase contacts, contractors, real estate agents, stockbrokers, or others, NHS would "gladly provide you with names and contact numbers." (All capitals omitted.) NHS made clear that it would provide such information as a courtesy and would not be responsible for the contacts' work.

NHS agreed to "[a]ssist with Medi-Cal eligibility [and] [a]ssist with Medi-Cal asset protection," emphasizing that "[w]ork that may require an attorney will be done by an outside attorney at no additional cost to you." (All capitals, boldface, and underscoring omitted.) Immediately following that sentence, Roland was asked to indicate which of several services and documents she wanted. She chose the following: competency letter from a doctor; transfer of property; opening of escrow; durable power of attorney for finances; durable power of attorney for health care; a new will; termination of joint tenancy; creation of joint tenancy; creation of informal life estate; quitclaim deeds; review of life insurance; opening of protected post-escrow account; sale of stock; preparation and filing of Medi-Cal application; federal gift tax letter; and assignment of geriatric case worker.

Based on what Roland requested, the Agreement stated: "If you decide to hire us, and we agree to accept you as a client, we will provide you with this Agreement, filled out with all of the required work to be performed. You will need to **read and sign** this Agreement. . . . Our fee, to complete your matter will be . . . **$29,750.00** . . . ." (All capitals omitted.) The "fee" had to be paid in full at the time the Agreement was signed. Further, once NHS began to work on the matter, Roland could receive a refund if she instructed the company to stop. More specifically, she would receive the portion of the funds that had not been used; the work that had been done would "be billed at our normal hourly office rate of **$500.00 per hour**, and you will be provided with a time itemization along with the refund." (All capitals omitted.)

The arbitration provision of the Agreement stated in part: "Client and Company hereby acknowledge that, as with all relationships, sometimes a dispute may arise during the Company's handling of the Client's matter. . . . [¶] Therefore, . . . it is agreed . . . that should any dispute arise between us whatsoever, you agree to have said dispute arbitrated before a neutral panel of not more than three arbitrators, conducted in accordance with the rules for commercial litigation of the American Arbitration Association [AAA], and that the result of said arbitration shall be binding (that means

no appeal) upon both you and the Company. By signing this Agreement, you have agreed to waive your right to litigate or otherwise challenge the Company through the court system, including the right to a jury trial and right to appeal." (All capitals and underscoring omitted.) Roland initialed this provision.

The Agreement entitled Roland to the services of a geriatric case worker for one hour "free of charge." After that, Roland would have to contact the case worker directly and "discuss an appropriate fee arrangement." NHS did not assist clients in locating or contacting long-term care facilities except to the extent those services were performed by the geriatric case worker.

The last page of the Agreement bore the signature, "Henderina T. Roland." It was dated May 20, 2002, and indicated it was signed in Glendale, California. The last line of the Agreement read, "Accepted by: N.H.S., LLC," which was followed by a signature line. No one signed for the Company.

In support of the motion to compel arbitration, defendants filed the Agreement, letters between the parties' counsel discussing arbitration of the dispute, the AAA rules, and a declaration by defense counsel. The declaration pointed out that N.H.S., LLC, was the predecessor of NHS.

Roland filed opposition papers, arguing that the Agreement was one for legal services and was void because it was not signed by the company. Roland submitted a declaration, stating that she first met defendants Basich and Marshall in May 2002 when she signed the Agreement. Marshall's business card did not indicate that she was an attorney but read, "Nursing Home Services." Roland signed the Agreement as instructed by Basich and Marshall. To Roland's knowledge, no one else signed the Agreement. She never received a signed copy of it from NHS. Roland paid NHS $29,000 for handling the matter. Marshall insisted that Roland transfer her home and personal property, worth over $600,000, to a third party, stating that Roland would get everything back after qualifying for Medi-Cal. Roland made the transfers, but nothing

was ever returned. Roland stated that she would not have permanently transferred more than $600,000 in property to obtain only $11,000 in Medi-Cal benefits.

Roland also submitted a declaration from an attorney, Terry Magady, who specializes in elder law, has been recognized by the National Elder Law Foundation, and has written several articles and book chapters on government benefits for the elderly. In a four-page declaration, Magady explained that he had read the Agreement, and it "was essentially for the provision of legal services." Magady also stated that Roland did not have to transfer ownership of her home to qualify for Medi-Cal.

In reply, Marshall submitted a declaration, stating that she was an "independent contractor" for NHS and that "I advise, represent, and prepare documents and advocate in my capacity as a lawyer for the clients of NHS." According to Marshall, "[t]he legal services that have been performed for Ms. Roland have been carried out by licensed attorneys." Marshall prepared a Medi-Cal application for Roland, handled the appeals of two Medi-Cal denials (one of which was successful), and "prepared legal documents necessary to effectuate [Roland's] long term care objectives."

The motion to compel arbitration was argued on April 21, 2006, and taken under submission. By order dated the same day, the trial court denied the motion for the reasons set forth in the opposition papers. Defendants filed an appeal.

II

DISCUSSION

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ." (Code Civ. Proc., § 1281.2.) In a petition to compel arbitration, "the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy. . . . The trial court must determine in advance whether there is a duty to arbitrate the controversy. . . . This determination 'necessarily requires the court to

examine and, to a limited extent, construe the underlying agreement.'" (*Green v. Mt. Diablo Hospital Dist*. (1989) 207 Cal.App.3d 63, 69, citations omitted.)

California has a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) "[D]oubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323.)

The interpretation of an arbitration agreement "is solely a judicial function unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence." (*Merrick v. Writers Guild of America, West, Inc.* (1982) 130 Cal.App.3d 212, 217; accord, *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670.) Where, as here, the language of the arbitration agreement is not in dispute, nor is the pertinent extrinsic evidence, the trial court's decision as to arbitrability is subject to de novo review. (See *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684; *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 711.)

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281; see also *id*., § 1281.2, subd. (b).) Arbitration may not be compelled if the entire contract is void. (See *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at pp. 29–32; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 610.)

Where an attorney fee agreement is not signed by both the client and the attorney, it is voidable at the option of the client. (See Bus. & Prof. Code, § 6148, subds. (a), (c); *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995–996.) Roland invokes section 6148 to declare the Agreement void and unenforceable.

"[An attorney fee] agreement is like any other contract creating a legal relationship: '"The nature of the instrument is not to be determined by what the parties called it. . . . Its nature is to be determined by its legal effect."' . . . 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' . . . 'The law respects form less than substance.'" (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 73, citations omitted.) "'[N]o disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice.'" (*Id.* at p. 73, fn. 10.)

As indicated in the declaration of Attorney Magady, the services to be provided under the Agreement were essentially legal in nature. Defendant Marshall conceded that she worked on Roland's behalf in her capacity as an attorney, drafting documents and giving advice. Marshall's business card bore the NHS company name. The Agreement made clear that the services of a professional *other than an attorney* were not included in the "fee": NHS would provide the "client" with contact references for accountants, real estate agents, stockbrokers, and others, but work that "require[d] an attorney will be done . . . at no additional cost to you." If Roland terminated NHS's work before completion, she would be billed at "*our* normal hourly *office* rate of $500.00 per hour." (Italics added, boldface omitted.) Exactly whose "office" was being referred to here? It turns out that defendant Basich's address with the State Bar was the same as NHS's address. Further, the contractual provisions setting forth a "normal hourly rate" ($500) and giving the "client" a "time itemization" sound like typical provisions in a legal retainer agreement. And the boldfaced, underscored, and all-capital-letter disclaimers in the second paragraph of the Agreement — for instance, "**WE DO NOT PROVIDE <u>LEGAL ADVICE OR SERVICES</u>**" — are belied by the list of services promised to Roland and their performance by an attorney. Last, the one

free hour of geriatric social work was so de minimis it did not establish that the Agreement was something other than an attorney fee agreement.[1]

Defendants discuss several cases in arguing that the arbitration provision is enforceable even though no one signed the Agreement on behalf of NHS. But all of those cases are inapplicable for the same reason: none concerned an unsigned *attorney fee* agreement. Defendants' authorities are also distinguishable on other grounds, as we now discuss.

Defendants rely primarily on a case in the real estate context holding that a broker, who did *not* initial the arbitration provision in a listing agreement, could compel arbitration against the seller, who did initial the provision (*Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231, 238–341). But *Grubb* is not without substantial criticism because it is inconsistent with the notion of mutuality of arbitration — that both sides must be subject to the arbitration provision for it to be enforceable. (See *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89–91; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1538–1539.) "[A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences." (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 120.)

Defendants also rely on the rule that an arbitration agreement may be invoked by a nonsignatory *beneficiary* of the agreement. (See, e.g., *Dryer v. Los Angeles Rams*

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[1] We do not suggest that a predispute arbitration provision in an attorney fee agreement is always, or even generally, illegal or unenforceable. (See *Erwin, Cohen & Jessup, LLP v. Kassel* (2007) 147 Cal.App.4th 821, 828–829 [enforcing predispute arbitration provision where client did not opt for arbitration under Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6200 et seq.)].) We address only the situation where an attorney fails to sign the fee agreement.

(1985) 40 Cal.3d 406, 418; *Lewsadder v. Mitchum, Jones & Templeton, Inc*. (1973) 36 Cal.App.3d 255, 261; *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith* (3d Cir. 1993) 7 F.3d 1110, 1121.) Thus, an agent may be able to compel arbitration *if his or her principal has signed the Agreement.* But NHS did not do so.

Similarly, "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations [of the signatory]." (*Boucher v. Alliance Title Co., Inc*. (2005) 127 Cal.App.4th 262, 271; accord, *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713, 1717–1718.) But in these cases, too, there was at least *one signatory for each side*, that is, there was a fully executed contract. Here, no one signed the Agreement on the defense side.

Finally, defendants rely on Civil Code section 3388, which states: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." That reliance is misplaced. Section 3388 applies to contracts *generally*. In contrast, Roland relies on a statute governing attorney fee agreements *in particular*. It is well settled that a more specific statute prevails over a more general one. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2002) 99 Cal.App.4th 880, 884; *Schoendorf v. U.D. Registry, Inc*. (2002) 97 Cal.App.4th 227, 243.)

In sum, the Agreement was an attorney fee agreement and was not signed by an attorney. It follows that, at Roland's option, the entire agreement is void under Business and Professions Code section 6148 and does not provide a basis to compel arbitration of her claims. The trial court properly denied defendants' motion.

III

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.